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No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* GEORGIA GOVERNOR SONNY PERDUE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a covered State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress' remedial powers under the Reconstruction Amendments when that enactment was founded on a Congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational basis standard.

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus Curiae is the Governor of the State of Georgia, Sonny Perdue.[1] Governor Perdue, as the head of the Executive Branch of Georgia government, is ultimately responsible for the execution of all state laws, including those related to elections in the state.

Governor Perdue submits this brief in support of Appellant's position that the 2006 renewal of Section 5 imposes an unconstitutional burden on covered jurisdictions, including Georgia and its political subdivisions. Specifically, Congress' renewal of the preclearance provisions of Section 5 continues complete federal control over election law changes in all previously-covered jurisdictions, regardless of whether the purpose of Section 5 has been served in any of those jurisdictions, as it has been in Georgia. By renewing the preclearance requirements without an adequate basis for doing so, Congress continues to

[1] As required by Rule 37.3(a) of this Court, *Amicus Curiae* Perdue has received the written consent of all parties to file this brief presented. With the exception of Attorney General Eric H. Holder, Jr., all parties and intervenors consented to the filing of all *amicus curiae* briefs. Counsel for *Amicus Curiae* Perdue requested and received written consent of the Solicitor General on behalf of the Attorney General, and a copy of that consent is filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *Amicus Curiae* Perdue states that none of the parties authored this brief in whole or in part, and no person or entity, other than the State of Georgia or Governor Perdue's counsel, made a monetary contribution to the preparation or submission of the brief.

impose upon on the State of Georgia and its political subdivisions the financial and administrative burdens associated with Section 5 compliance that simply are no longer constitutionally defensible.

Equally important to his interest in eliminating the unnecessary hard costs incurred in obtaining the federal government's blessing upon every single change in any law, rule or regulation touching on Georgia elections, Governor Perdue has an interest in correcting the extremely negative and totally erroneous implication of Congress' action. Today's Georgia is not, as Congress suggests, a place where the state or local governments sponsor racial discrimination in the electoral process that must be curbed by the federal government. To the contrary and as the data below shows clearly, Georgia has earned the right to be free from the preclearance requirements of Section 5.

Unless Congress' unconstitutional action and the District Court's erroneous decision are reversed, Georgia can reasonably expect to be subject to Section 5 for the next 22 years and, based on the analyses of Congress and the District Court, Georgia can expect to be subject for many years after the 2006 renewal expires. Because there is no constitutional basis for Congress' 2006 renewal of Section 5, the renewal legislation should be invalidated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia is a covered jurisdiction under Section 5 of the Voting Rights Act. For the past 44 years therefore, neither the State of Georgia nor its hundreds of political subdivisions have been allowed to implement *any* change to *any* law, regulation, policy or procedure related to elections and voting until obtaining preclearance from the federal government under Section 5 of the Voting Rights Act. Under that provision, any electoral change requires that Georgia and those subdivisions prove to the satisfaction of the federal government that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on the basis of race.

Under Congress' 2006 renewal of the preclearance provisions of Section 5, Georgia and all of its subdivisions will continue to be subject to this extraordinary, and originally temporary, burden for at least the next 22 years. At the end of that time, Georgia and its political subdivisions will have been subject to this "temporary" federal supervision for over 67 years, despite the overwhelming evidence that they no longer suffer the ills that originally led to federal oversight.

If allowed to stand, the District Court's decision will also mean that covered jurisdictions can reasonably expect to be subject to federal oversight forever. Under Congress' analysis as adopted by the District Court, there need never be any consideration

of present circumstances; a jurisdiction that engaged in racial discrimination in voting over 40 years ago is presumed to be engaged in that conduct and to intend to continue to be so engaged. No matter what evidence of progress is adduced, there simply will never be enough evidence to allow covered jurisdictions to take off the Section 5 badge of racism. In short, once a racist state, always a racist state.

As the data outlined in this brief clearly demonstrates, nothing is further from the truth in Georgia. With the exception of the 2006 and 2008 election data (both of which were unavailable at the time) Congress had before it every bit of this data when renewing Section 5. That data confirms the testimony of Congressman John Lewis, one of the heroes of the civil rights movement and the longest-serving member of Congress from Georgia, in the most recent Section 5 case from Georgia regarding Georgia's progress from 1965 to the present: "[I]t's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really." However, Congress ignored the present in favor of the much easier path of looking to an undeniable past. In so doing, Congress assured the unconstitutionality of its action.

No matter which constitutional analysis is used, the renewal fails. Applying the correct analysis, the renewal is not a congruent or proportional remedy. Even using the test that the District Court erroneously applied, the renewal is not rationally related to the alleged ill Congress seeks to cure: perceived racial

discrimination in the electoral process. The renewal is therefore unconstitutional and should have been invalidated by the District Court.

The unconstitutionality of the 2006 renewal of Section 5 is not saved by the bailout provisions of the statute because the bailout provisions are completely illusory for a number of reasons. First, while Georgia is held accountable under the bailout provisions for every single electoral decision those subdivisions make, it has absolutely no authority over those political subdivisions with respect to Section 5. If even *one* of the subdivisions is the subject of a Section 5 objection, the State of Georgia is not eligible for bailout for another 10 years following that objection. Additionally, if even *one* of those subdivisions has ever failed to make a Section 5 submission when one was required, the State of Georgia does not qualify for bailout under the statute. Furthermore, although Georgia cannot bail out unless it can certify that both the State and *all* of its covered political subdivisions are and have been in compliance with Section 5 for the requisite periods, the State has absolutely no authority to compel the subdivisions to provide the information needed to make that showing.

Finally, as a recent Georgia example shows, the interpretation of Section 5 by the Voting Section at the Department of Justice has stretched far afield from the original intent of Section 5, which was to prevent gamesmanship by the covered states in their enactment of electoral law. The practical impact of that change at the Department of Justice is to eliminate any

real possibility for covered jurisdictions to bail out of Section 5.

Both Congress' renewal and the District Court's erroneous opinion completely ignore the present and rely on a flawed bailout mechanism to justify the coverage of any jurisdiction which should not be subject to Section 5. Because the 2006 renewal provisions of Section 5 cannot be constitutionally applied either to Georgia or the other covered jurisdictions, the District Court's decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONGRESS NEED ONLY HAVE HAD A RATIONAL BASIS FOR RENEWING THE PRECLEARANCE REQUIREMENTS OF SECTION 5

In analyzing the remedial legislation that is Section 5, the District Court applied the wrong standard. Finding that Congress need only demonstrate a rational basis in the exercise of its remedial powers under the Reconstruction Amendments, the District Court ignored this Court's jurisprudence requiring a much stricter test. Under the correct test, Congress cannot exercise its remedial powers under the Reconstruction Amendments unless the remedy fashioned is congruent and proportional and tailored to address or prevent the conduct in question. Congress did not meet, or even attempt to meet, that standard in its

2006 renewal of Section 5. Instead, Congress based its renewal on outdated data, thereby creating a phantom evil and a resulting remedy that necessarily is neither congruent nor proportional.

A. This Court's Jurisprudence Requires Enforcement Mechanisms under the Fourteenth and Fifteenth Amendments Be Congruent and Proportional to the Alleged Wrong Congress Seeks to Redress

The District Court erroneously rejected Appellant's argument that the renewal of Section 5 could stand only if that action was a remedy congruent and proportional to the harm Congress sought to address – racial discrimination in voting and election law. Instead, the District Court determined that if Congress' action met the rational basis test, that action was constitutional. To support that determination, the District Court concluded that the 2006 renewal was, in reality, remedial legislation enacted under the Fifteenth Amendment rather than under the Fourteenth Amendment, and therefore, a lower standard of review, i.e., the rational basis test, applied.

However, this Court has been clear that the standard of review for Congressional enforcement of the two remedial clauses is "virtually identical." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001). The District Court's attempt to split the standard and thereby buttress its conclusion was in error and should be rejected by this Court.

B. The Renewal of Section 5 Is Neither Proportional Nor Congruent to the Wrong Congress Claimed to Redress

In order to assess the constitutionality of remedial legislation enacted under the Reconstruction Amendments, a reviewing court must follow a three-step process. First, the court must determine the precise "metes and bounds" of the right in question. *Garrett*, 531 U.S. at 368. Second, the court must find that Congress identified a history or pattern of deprivation of the right in question. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997). Third, the court must find that the statutory remedy is congruent and proportional to the right that Congress purports to protect or enforce. *Garrett*, 531 U.S. at 372.

In the case at hand, the "metes and bounds" of the right in question – the right to be free from racial discrimination in the electoral process – is undisputed. There is also no dispute that Congress identified some historical deprivations of that right in covered jurisdictions, even though those examples were either extremely dated or did not involve government-sponsored racial discrimination in the electoral process.

However, the 2006 renewal of Section 5 fails the third prong of the analysis miserably. That prong requires the remedy be at least somewhat tailored to redress the harm. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 629 (1999). Remedial legislation which is not

even remotely tailored to redress a particular harm cannot withstand the congruent and proportional test required by this Court. *Garrett*, 531 U.S. at 372.

In its 2006 renewal of Section 5, however, Congress did not even attempt to tailor its remedy to redress racial discrimination that may exist in this country's electoral process. Instead, Congress used an outdated formula to presume that the original covered jurisdictions, including Georgia, still discriminated in the electoral process (and that, conversely, not one of the noncovered jurisdictions engaged in such discrimination).

Although upholding the constitutionality of Section 5 in the past, the Court has long acknowledged that, in singling out certain jurisdictions for Section 5 coverage, Congress' focus must be laser sharp. Beginning with the original challenge to Section 5 when the Court upheld Section 5, it based that conclusion in part on the fact that Section 5 was narrowly aimed at areas of the country where discrimination was "most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966); *see also City of Rome v. U.S.*, 446 U.S. 156 (1980) (upholding 1975 renewal).

However, in 2006, Congress punted. When renewing the preclearance provisions of the Voting Rights Act in 2006, it left in place the first coverage formula ever used, which relies on statistics from the Presidential Election of 1964. 42 U.S.C. § 1973c. At the time it was first applied in 1965, that coverage

formula captured the State of Georgia. When Congress renewed the provisions of Section 5 and extended coverage to 2031, it used the same statistics, now 44 years old. H.R. 9, 109th Cong. (2006) (enacted). By the end of the 2006 renewal period, the statistical formula will be nearly 70 years old but still in use, despite the availability of data from thousands of elections during those seven decades.

The result is over-inclusive coverage, which is neither a congruent nor proportional remedy. The data before Congress, as well as data now available from the 2006 and 2008 elections, prove the lack of congruence and proportionality.

1. The Coverage Requirements Are Unconstitutionally Over-Inclusive Because Congress Failed to Address Dramatic Progress by Covered Jurisdictions Such as Georgia

Congress' decision to use clearly outdated information rather than current data precludes any argument that the remedy imposed is congruent and proportional or even has a rational basis. Looking at the information that was available to Congress makes its use of the 41-year-old formula even more egregious.

Georgia provides a prime example. The state has made dramatic progress in 44 years, as was clearly revealed in Congressional hearings. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose:*

Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong. 2891-2939, Serial No. 109-79, Vol. I (2005) (hereafter "Georgia Study" and cited by hearing transcript page). However, in blindly renewing the 1964 coverage formula, it is clear that Congress never even considered that progress.

In its opinion, the District Court attempts to justify Congress' action, concluding that after Congress reviewed registration and turnout rates, looked at the election of minority candidates and examined racial polarization, it reasonably concluded that renewal was warranted. *Northwest Austin Mun. Utility Dist. Number One v. Mukasey*, 573 F.Supp.2d 221, 268 (D.D.C. 2008). The District Court's conclusion is not borne out by the facts or the law.

a. Georgia Demonstrated Dramatic Progress by its Tremendous Increases in African-American Registration and Participation Rates

The original basis for Georgia's coverage under Section 5 was a low rate of voter participation in the 1964 Presidential Election. 42 U.S.C. § 1973c. Since that time, however, Georgia voters, and particularly African-American voters in the state, have clearly experienced full participation in this most basic component of democracy. *Voting Rights Act: The Continuing Need for Section 5: Hearing before the Subcomm. on the Constitution of the House Comm. on*

the Judiciary, 109th Cong. 29, Serial No. 109-75 (2005) (testimony of Ronald Keith Gaddie, Professor of Political Science, the University of Oklahoma).

After each major election, the U.S. Census Bureau conducts a survey of voter registration and participation rates. U.S. Census Current Population Survey (available at http://www.census.gov/cps/). Because the voters self-report their participation in the elections, there is some built-in error. However, the results of the Census surveys are helpful in the recognition of trends both in voter registration and turnout. Georgia Study at 2897.

In 1980, fifteen years after passage of the Voting Rights Act, registration rates by race in Georgia still indicated a large gap. *Id*. at 2926. White voters reported 67% registration, while black voters reported 59.8% registration. *Id*. By 1990 though, this gap had narrowed dramatically, with black voters reporting 57.0% registration and white voters reporting 58.1% registration. *Id*. Most notably, by 2004, the gap had actually flipped, with black voters in Georgia reporting a higher registration rate (64.2%) than white voters in the state (63.5%). *Id*.

Turnout rates for elections have undergone a similar change. In 1980, black voters in Georgia reported turning out at a rate of 43.7%, while their white counterparts reported voting at a rate of 56%. *Id*. at 2927. By 2004, black voters reported ***higher*** turnout rates than whites. *Id*. Black voters reported a

turnout number of 54.4%, while white voters reported 53.6%. *Id*.

In summary, it is indisputable and undisputed that barriers once existed for black voters in Georgia, both with respect to registration and turnout. Those barriers, however, clearly do not exist now. What once was a state where black voters were systemically excluded from voting is now a state where black voters register and participate at rates equal to if not exceeding that of white voters.

b. Georgia Demonstrated Dramatic Progress in its Election of Many More African-American Officials

Georgia's long history of discrimination against African-American voters and officials is undeniable. In 1964, very few African-Americans held public office in the state. The numbers were so low that in 1969 – the earliest date for which statistics are available, and four years after the passage of the Voting Rights Act – of the hundreds of offices at every level across the state, there were only 30 African-American elected officials. Georgia Study at 2929. Although the number began to grow slowly, no real escalation occurred until the 1980s. *Id*.

By 2001, the last date for which statistics are available, the number of African-Americans elected to state or local office in Georgia stood at 611. *Id*. That number constitutes an increase of more than 1,900% from 1969.

Similarly, the African-American Congressional delegation in Georgia has grown exponentially since passage of the Voting Rights Act. Seven years after original passage, Georgia elected its first African-American Member of Congress in the 20th century, when Andrew Young won a district that was only 44% black. Georgia Study at 2906. Today, four out of Georgia's thirteen Members of Congress are African-American; two of those Members are elected from districts that do not contain a majority of black voters. *Id*. at 2908-09. Georgia's African-American Congressmen make up 31% of the state's delegation, exceeding the state's 29% total black population.

In statewide elections, Georgia showed little sign of progress for the twenty years after the passage of the Voting Rights Act. Then, in 1984, the Governor appointed the first African-American statewide officer, choosing Robert Benham to serve on the Georgia Court of Appeals. *Id*. at 2912.[2] That same year, Justice Benham, who now serves on the Georgia Supreme Court, won re-election to the Court of Appeals against three white challengers. Georgia Study at 2912. In 1989, Justice Benham became the first African-American to serve on the Georgia Supreme Court. *Id*. Since that time, he has been re-elected three times, most recently in 2008.

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[2] In Georgia, judges on the Supreme Court and Court of Appeals are elected to six-year terms. GA. CONST. Art. VI, Sec. VII, Par. I.

In 1992, Chief Justice Leah Ward Sears joined Justice Benham on the Georgia Supreme Court, becoming the first African-American woman to serve on that court. *Id*. Georgia's progress is soundly demonstrated by a review of Chief Justice Sears' elections. Following her appointment, Chief Justice Sears won re-election three times. In the 2004 election, she soundly defeated a white conservative who ran against her, despite her opponent's strong support from the Republican Party establishment.[3] *Id*.

Today, three of the seven Justices on the Georgia Supreme Court are African-American. *Id*. Two of the twelve judges on the Georgia Court of Appeals are African-American. *Id*.[4] None of this progress, however, was even considered by Congress when it left the 1964 coverage formula in place and ignored more than 40 years of progress in Georgia.

Even though appellate judges in Georgia must be elected statewide, some political scientists discount judicial elections as lower-profile races. As one who has successfully completed two statewide campaigns, *Amicus Curiae* Perdue disputes the notion that success in any statewide race should be disregarded as an easy task. He also points to Georgia's other

[3] At the time of Chief Justice Sears' 2004 re-election, the Republican Party was the majority political party in Georgia, as is still the case today.

[4] The Georgia Study indicates that three of the twelve judges on the Court of Appeals are African-American. Since the publication of the study, Judge John H. Ruffin Jr. has retired.

African-American officials elected statewide who serve in two of the highest-profile constitutional offices and who have consistently won re-election in Georgia, a majority-white, majority Republican state. Attorney General Thurbert Baker has won twice, both times in contested elections and both times by substantial margins. Georgia Study at 2913. Likewise, Labor Commissioner Michael Thurmond has also won election and re-election. *Id*.

There are 34 statewide elected officials in Georgia. Today, seven of those positions are held by African-Americans. All were required to and did gain a substantial portion of the white vote in order to win their statewide elections. *Id*. at 2914.

Similarly, the Georgia General Assembly has become a vastly more diverse legislature since the passage of the Voting Rights Act. In 1965, the Georgia Senate had 54 members, but only two were African-American. In 1973, although the state Senate had added two additional seats, there were still only two African-American members of the 56 members. *Id*. at 2930. By 2005, 11 of the 56 state Senators were African-American, and one state Senator was Latino. *Id*.

In 1963, the Georgia House of Representatives had 205 members but no African-American members. *Id*. In 1965, seven of the 205 members were African-Americans. *Id*. By 2005, the state House had shrunk in size to a total of 180 members. Of those 180, 39 were African-American and two were Latino. *Id*.

The vast number of African-Americans elected to all levels of office in Georgia shows that the Georgia of today is not the Georgia of 1964. In using the same formula to determine coverage, Georgia is unconstitutionally singled out for preclearance, based on behavior of individuals who, by and large, are long dead.

c. Georgia Demonstrated Dramatic Progress in White Voter Support for African-American Candidates

Not only have the policies of the state of Georgia and the face of its elected leadership changed dramatically since 1965, the behavior of Georgia voters has also changed. While many white Georgia voters in 1965 refused to support African-American candidates, they now offer strong support.

Nothing evidences that support more clearly than comparing the votes President Barack Obama received in Georgia with the votes received by the last two Democratic Presidential nominees, Senator John Kerry and former Vice President Al Gore. In the 2008 election, President Obama received 1,844,137 votes of the 3.9 million Presidential votes cast in Georgia. Those raw numbers mean that President Obama received 47% of the votes cast in a majority Republican state with only 29% black population. Georgia Secretary of State, *November 4, 2008 Official Election Results* (available at http://sos.georgia.gov/elections/election_results/2008_1104/001.htm).

In Georgia, President Obama received a percentage vote 3.8 points higher than former Vice President Gore in 2000, and 5.6 points higher than Senator Kerry in 2004. Congress' insistence that Georgia has "a continuing legacy of racism" in the context of the renewal of the VRA is nonsensical when an African-American candidate for President receives a greater percentage of the vote than his white predecessor candidates.

President Obama received a higher percentage of the vote in Georgia than in any other fully-covered state. Even a brief comparison of statistics demonstrates that white voters showed greater support for the President in Georgia than other fully-covered states. The state of Louisiana, which had a 31.9% black population[5] – higher than Georgia's – gave the President only 39.93% of the vote. Louisiana Secretary of State, *November 4, 2008 Official Election Results* (available at http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=110408). Likewise, in Mississippi, with a 2007 black population of 37.1% – almost 10 percentage points higher than Georgia's – President Obama received only 43% of the vote. Mississippi Secretary of State, *November 4, 2008 Official Election Results* (available at http://www.sos. state.ms.us/elections/2008/08%20Certification%20Results/Cert/President%20&%20VP.pdf). The fact that more white

[5] The 2007 estimates are the most recent available from the U.S. Census Bureau through the 2005-2007 American Community Survey.

voters in Georgia cast votes for an African-American Presidential candidate than did other states is but one indication of the fallacy in Congress' assumption that all covered states are alike and therefore should all remain subject to the preclearance requirements of Section 5.

This trend seen in the votes cast for President Obama is not limited to the Presidential votes in Georgia. In the most recent statewide election (2006), Georgia's African-American Attorney General Thurbert Baker received more votes than any other Democrat, white or black, running statewide. Georgia Secretary of State, *November 7, 2006 Official Election Results* (available at http://sos.georgia.gov/elections/election_results/2006_1107/swfed.htm). Attorney General Baker also received more votes than Georgia's white Republican Secretary of State, Karen Handel and white Republican Lieutenant Governor, Casey Cagle. *Id*. Out of the ten partisan statewide state offices up for election in 2006, Attorney General Baker received the fourth highest number of votes of any successful candidate. *Id*.

Further, black candidates running statewide generally receive the same percentage of votes as white candidates. A perfect example was seen in the 2004 election when the Democratic Presidential nominee was white, the Democratic U.S. Senate nominee was black, the Democratic nominee for the state's Public Service Commission was white, and all were challenging incumbent Republicans. Georgia

Study at 2922. The votes cast were almost exactly even between the candidates:

Name	Office	Race	Percentage
Sen. John Kerry	President	W	41.4%
Denise Majette	U.S. Senate	B	40.0%
Mac Barber	PSC	W	39.5%

Id.

Unlike 1965, there is no pattern of discrimination against African-American candidates by Georgia's white voters. Congress' failure to address the changes from 1965 to today make the formula over-inclusive and unconstitutional.

2. The Over-Inclusive Coverage Requirements in the 2006 Renewal of Section 5 Are Not Saved by the Bailout Provision Because that Relief Is Not an Option for Many Covered Jurisdictions, Including Georgia

One of the ways Congress originally sought to address the problem of over-inclusivity in Section 5 was to add the bailout provision found in 42 U.S.C. § 1973b. *Boerne*, 521 U.S. at 533. However, in the 2006 renewal, the bailout procedures do not save the day. Those provisions do not reduce the "possibility of overbreadth," *id*., because it is practically impossible for any jurisdiction to bail out of coverage.

The District Court, however, relied on the bailout provisions in an attempt to eliminate any complaint that the coverage formula for the 2006 renewal was unconstitutionally over-inclusive. According to the District Court, any jurisdiction which was improperly covered could bail out. *Mukasey*, 573 F.Supp.2d at 274.[6] As discussed below, however, the District Court's conclusion is flawed. The bailout provisions, also renewed without change,[7] do not save the statute.

[6] The District Court cited the bailouts by several jurisdictions to attempt to prove its point. *Mukasey*, 573 F.Supp.2d at 233-34. While some counties in Virginia have successfully bailed out, they are the *only* jurisdictions to attempt bailout since the last renewal of Section 5 more than 25 years ago. Section 5 Covered Jurisdictions (available at http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1). Moreover, because Virginia counties have no political subdivisions, the example is an apples to oranges comparison when considering the feasibility of bailout for covered states such as Georgia, with hundreds of covered subjurisdictions.

[7] During the renewal debate, Congress specifically turned back an attempt to expand the bailout provisions. 152 CONG. REC. H5206-07 (Daily Ed. July 13, 2006) (Recorded Vote on Westmoreland Amendment).

a. The Bailout Provisions Falsely Presume an Ability by the Covered Jurisdictions to Force Local Governments to Comply with Section 5 Even When, as Is the Case in Georgia, the Covered Jurisdiction Has No Control Over Local Governments

Georgia has nearly 900 governmental jurisdictions: 159 counties, 531 cities, and 183 school districts. In addition, Georgia has more than 570 "special districts" of one type or another. U.S. Census Bureau, 2007 Census of Governments. Unlike many states, no Georgia jurisdictions are under the control of any other entity. Each county functions independently from cities within its boundaries, each school board functions independently from county or city jurisdictions, and cities and special districts are not answerable to the counties in which they exist. GA. CONST. Art. IX, Sec. II; O.C.G.A. § 36-35-1 *et seq*.

This independent nature of each jurisdiction makes it even more challenging when a county or the state seeks to bail out from coverage. Even if a county had a perfect record of compliance since 1965, one failure by a city or school board within the boundaries of the county will prevent the county from bailing out for another ten years. Similarly, one mistake by a city with a very small population will prevent the entire State of Georgia from bailing out.

Georgia provides a perfect case in point. The last time the United States Attorney General lodged an

objection against the state of Georgia was in 1994.[8] The last time the state of Georgia was denied judicial preclearance was in 2001, during statewide redistricting; however, this Court overturned that refusal to grant judicial preclearance, *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Based on those objections and without liability for actions of political subdivisons, Georgia is at best eligible for bailout now or at worst less than two years away from being eligible.

However, once accountability for the actions of subjurisdictions is factored in, Georgia is still seven years away from even being able to think about bailing out because of the DOJ's questionable objection to the 2006 decision of a five-person voter registration board in Randolph County, Georgia (population 7,294). In that instance, the voter registration board issued a voter registration card to an elected official for the district in which he actually resided, following a redistricting of school board districts. In spite of this reality, the Department of Justice somehow determined that placing the voter in the correct district was a violation of Section 5 and objected to the change. Thus, using Section 5, the Department of Justice required Randolph County to allow the voter to maintain "residency" in a district different from the one where he actually lived so he could run for re-election to the school board in his old district. Letter from Randolph County Attorney

[8] A 1996 objection by the Attorney General was withdrawn.

Tommy Coleman to Joseph D. Rich enclosing Preclearance Submission for Randolph County (July 13, 2006), located in DOJ File 2006-3856.

Thus, Georgia's first eligibility for bailout is now extended until at least 2016 based on the Department of Justice's questionable review and mandate regarding a decision made by a five-person voter registration board of a county that consists of 0.0782% of the entire population of Georgia. It is simply irrational for an entire county or the entire state to bear responsibility for the compliance of smaller jurisdictions over which they exercise absolutely no control.

b. Additionally, the Lack of Authority Over Local Governments Makes It Impossible for a Covered Jurisdiction Such as Georgia to Bail Out Because the State Cannot Verify that All Required Filings Have Been Made Over the Past 40 Years

When a jurisdiction of any size wants to bail out, it must undertake a review of ***every*** election law change made since 1965 to ensure that it is not currently enforcing any election law that has not been precleared, and then assert in the bailout litigation that ***every*** required filing for the currently enforced changes has been made. 42 U.S.C. § 1973b(a)(1)(D). That requirement is, for a covered state like Georgia, a logistical impossibility.

Most Georgia counties and cities employ part-time attorneys to handle legal affairs for the jurisdiction, including filing for Section 5 preclearance when necessary. Even if every political subdivision has always applied for and received preclearance when required (a doubtful proposition), there is no practical way to verify that fact. Even if the local jurisdictions were required to provide that information to the state, which they are not, no county or city attorney has the institutional knowledge to stretch back over 44 years and ensure that every single election change has been precleared. Unfortunately, the bailout provisions require the State, when seeking bailout, to certify just such complete compliance.

In short, Georgia can only bail out if, (a) in the past ten years, the United States Attorney General has not raised any Section 5 objections as to electoral changes made by the State or by any local jurisdictions which the State cannot and does not control and (b) Georgia can verify that each of its political subdivisions have requested and received preclearance for all electoral changes currently enforced. Georgia is required under the bailout provisions to collect information from all its various subjurisdictions that every single one of the tens of thousands of election laws, rules, and regulations in force over the last 44 years by over 1,400 governmental jurisdictions, including minor changes such as relocating a polling place from one public building to another within the geographical boundary of a voting precinct, to ensure that no rule currently being enforced had not been precleared. Even

assuming that the local jurisdictions have been in perfect compliance and can prove that fact (two very broad assumptions), they are not required to provide that information to the State.

For a State like Georgia, the bailout mechanism provides no relief from the over-inclusiveness of Section 5's renewal.

II. EVEN IF THE DISTRICT COURT CORRECTLY CHOSE TO APPLY THE RATIONAL BASIS TEST, THE PRECLEARANCE PROVISIONS OF SECTION 5 CANNOT BE CONSTITUTIONALLY APPLIED

As alleged by the Appellant, and as shown by the place Georgia finds itself, the preclearance provisions of Section 5 cannot be constitutionally applied, even using a rational basis test as the District Court did. Even before the election of President Obama, the undisputed facts outlined above show that Section 5 has served its purpose in covered jurisdictions such as Georgia. No longer is Georgia engaged in the gamesmanship Section 5 was designed to eliminate, i.e., covered jurisdictions trying to stay one step ahead of the federal government so as to perpetuate racial discrimination in the electoral process.

As noted above, Congressman John Lewis, one of the heroes of the civil rights movement, explicitly recognized the enormous changes in the South, which comprises the majority of the covered jurisdictions. In *Georgia v. Ashcroft*, Congressman Lewis offered

testimony that the percentages of minority voters in majority-minority districts could be reduced below 50% without any decrease in the ability of minority voters to elect candidates of choice. He testified, "We've come a great distance. I think in – it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race." Georgia Study at 2918, *citing* Affidavit of John Lewis in *Georgia v. Ashcroft*, February 1, 2002, p. 18. Earlier in the same sworn statement, Congressman Lewis said, "So there has been a transformation, it's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really." *Id*., *citing* Affidavit of John Lewis in *Georgia v. Ashcroft*, February 1, 2002, p. 15-16.

Finally, while the results of the 2008 Presidential election obviously were not before Congress when it renewed the preclearance provisions of Section 5, those results support the contention that a Section 5 standard unchanged from more than 40 years ago cannot be said to be rational. The election of President Obama, and especially the President's voter performance in Section 5-covered jurisdictions, illustrates how far those jurisdictions have come from their history of discrimination.

More specifically, in light of the dramatic progress made, there is no rational basis upon which Congress could continue to subject certain jurisdictions to preclearance requirements based on 45-year-old data. Furthermore, with no realistic option for

"bailing out" for the next 25 years, states like Georgia have no mechanism to escape the overbreadth of the renewal.

CONCLUSION

Congress' remedial powers under the Fifteenth Amendment cannot extend to the point of ignoring reality. Because Section 5 of the Voting Rights Act as renewed cannot be constitutionally applied, the judgment of the District Court should be reversed and remanded for judgment to be entered in favor of Appellant.

Respectfully submitted,

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